

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)	
)	
Accelerating Wireless Broadband Deployment by)	WT Docket No. 17-79
Removing Barriers to Infrastructure Investment)	
)	
Revising the Historic Preservation Review Process)	WT Docket No. 15-180
For Wireless Facility Deployments)	

COMMENTS OF THE NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS

These comments are filed by the National Conference of State Historic Preservation Officers (NCSHPO) in response to the Notice of Proposed Rulemaking (NPRM) and Notice of Inquiry (NOI) released March 30, 2017 in advance of the Commission’s April open meeting.

INTRODUCTION

The NCSHPO is the national nonprofit organization that represents State Historic Preservation Officers (SHPOs) in every state, US Territory, and the District of Columbia. Among the different roles and responsibilities of NCSHPO is to work with the Advisory Council on Historic Preservation (ACHP) and Federal Agencies on program alternatives to the “Section 106” historic preservation review process outlined in the National Historic Preservation Act of 1966. NCSHPO has the ability to negotiate and sign agreement documents on behalf of its membership to approve alternate review procedures such as the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission (NPA) and the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (Collocation NPA) – both substantially mentioned in this proceeding. This efficiency enables some consistencies to project review without the need to separately negotiate with every state.

For reference, the responsibilities of the SHPO are defined in the National Historic Preservation Act (54 U.S.C. 302303) and are grounded by the premise that states should be able to identify the historic resources of importance to its citizens and have a voice in evaluating the impacts of federal undertakings on those resources:

(a) IN GENERAL.—It shall be the responsibility of the State Historic Preservation Officer to administer the State Historic Preservation Program.

(b) PARTICULAR RESPONSIBILITIES.—It shall be the responsibility of the State Historic Preservation Officer to—

(1) in cooperation with Federal and State agencies, local governments, and private organizations and individuals, direct and conduct a comprehensive statewide survey of historic property and maintain inventories of the property;

- (2) identify and nominate eligible property to the National Register and otherwise administer applications for listing historic property on the National Register;
- (3) prepare and implement a comprehensive statewide historic preservation plan;
- (4) administer the State program of Federal assistance for historic preservation within the State;
- (5) advise and assist, as appropriate, Federal and State agencies and local governments in carrying out their historic preservation responsibilities;
- (6) cooperate with the Secretary, the Council, other Federal and State agencies, local governments, and private organizations and individuals to ensure that historic property is taken into consideration at all levels of planning and development;
- (7) provide public information, education, and training and technical assistance in historic preservation;
- (8) cooperate with local governments in the development of local historic preservation programs and assist local governments in becoming certified pursuant to chapter 3025;
- (9) consult with appropriate Federal agencies in accordance with this division on—
 - (A) Federal undertakings that may affect historic property; and
 - (B) the content and sufficiency of any plans developed to protect, manage, or reduce or mitigate harm to that property; and
- (10) advise and assist in the evaluation of proposals for rehabilitation projects that may qualify for Federal assistance.

Section (9) specifies the role of the SHPO with Federal agencies in project review, while the rest of the sections contextualize the SHPO's broader responsibilities. Additionally, the ACHP's regulations put a 30-day deadline on SHPO review from the time adequate information is submitted. Thus, the vast majority of project reviews take 30 days or less. Further, the NPA and Collocation NPA outline numerous situations that we all agree can be excluded from review all together.

SHPOs take very seriously their statutory role and NCSHPO, in turn, remains committed to working with the FCC and the ACHP to determine common-sense improvements and approaches to achieving the stated goal of accelerating broadband deployment. But we believe the best approach must be a thoughtful and deliberative one to assure both the deployment of a technology that we all benefit from as well as the protection of our historic places.

GENERAL COMMENTS AND SUGGESTIONS

Over the past few years, including at our 2005 Annual Review of the NPA, we have made suggestions and provided comments that we think could aid in more efficient review.

Clear Communication and Full Disclosure: In the many years that NCSHPO has been working with the FCC, the ACHP and industry on finding ways to achieve efficient project review, we frequently experience a lack of clarity about the nature of undertakings, the types of equipment being deployed,

the infrastructure necessary, the quantity of deployments, the appearance of equipment, the size of equipment, the location of equipment and even the definitions used to describe it. Frequently, months are spent considering the impact of what appears to be a fairly discreet “box” that indeed may have little effect, only to find that there is a failure to disclose that accompanying those boxes are a series of additional switches, antenna, structures or other infrastructure – or that there will be additional variations in size, shape, color and material depending upon the carrier and location. In short, it becomes difficult to define exactly what is being reviewed – making it hard to establish a uniform process if the installation itself is not uniform and the impacts not disclosed. In our opinion, consistent and clear disclosure and description of the elements proposed for installation and perhaps an illustrated guide (with dimensions) of terms and equipment might enable a more productive conversation. Such a guide would need to be regularly updated to reflect frequent changes in technology and make it easier to see if existing programmatic approaches can be employed to handle review – or whether new ones should be sought.

Adequate Information – The best decisions and the most efficient processes rely upon adequate information. First, it must be understood that to make a determination on the impact of an undertaking on historic resources one has to first know what historic resources are present, and then know the scope and details of the project. Although this sounds simple, in practice, it is not always so.

State and tribal inventories and survey information are in many cases incomplete. In order to compensate for their federal responsibilities, states and tribes rely upon funding from the Historic Preservation Fund (HPF) – a funding stream established in 1976 based on a very small percentage of lease revenues generated from the Outer Continental Shelf. Although authorized at \$150 million per year, the funds are subject to congressional appropriation. As such, funding has never reached this level – usually hovering around 30% to 50% of the authorized amount. And it has never been adjusted for inflation. While tremendous progress has been made using state or other sources of support, not every SHPO has the most current or electronically available survey data. Recognizing this, submission for projects not already covered by the exclusions in the NPA or Collocation NPA may require additional information in order to make a determination. Unfortunately, at times, this information gap is exacerbated by applicants (or their contractors) providing documentation that doesn’t meet minimum requirements, such as providing an adequate map.

As a practical matter, we have recommended that the FCC revisit their Form 620 and 621 Submission package. These forms were created more than 10 years ago and in some cases require the submission of unnecessary information (wasting time and paper), and in others lack field inputs that would make identification and review efforts more efficient. Although the FCC expressed an interest in undergoing a review of these forms, that effort has not advanced. SHPOs remain ready and willing to assist in revising the submission package forms to seek efficiencies.

Improve E-106 System – The states that are able to participate in the electronic review system (E-106) designed by the FCC, have provided feedback that the system could use some improvements to prevent confusion and delay. For example, currently, you can only select “concur,” “concur with conditions,” or “not concur.” If you “concur with conditions,” the system will flag the review as unresolved and in need of a Memorandum of Agreement (MOA) – which isn’t always necessary. Frequently the non-concurrence is going from a “no effect” determination to a “no adverse effect” determination – rendering an MOA unnecessary. Again, as with the Forms 620 and 621, some common-sense attention

to existing systems can help to improve the process and avoid delays. We remain committed to helping with this in any way we can.

State or Regional Agreements - In a country as geographically diverse as the United States, it is hard to develop a review process that can address and accommodate every type of variation. For this reason, other federal agencies have employed State or Regional NPAs or even Nationwide Prototype Agreements that permit for the development of state protocols. This approach takes into account the survey data available in a given area, the types of resources that might be affected, and the types of installations (undertakings) relevant to the project at hand. Certainly if such a prototype system can be employed by the Federal Emergency Management Agency (FEMA) to comply with Section 106 in response to complex disaster events, such an approach could be employed to tailor efficient project review for the wireless industry. If a state has a robust survey system and is comfortable accepting electronic submissions of information and can review a project quickly, we recommend tailoring the review in that state to achieve that efficiency enabling the FCC to focus resources on states that may have fewer resources at their disposal.

COMMENTS ON PROPOSALS IN THE NPRM

The NCSHPO offers comments on specific questions posed in the NPRM below by paragraph number:

#37 – Costs and Changes to Construction – SHPOs, as a condition for receiving their HPF Funds, do not charge fees for Section 106 reviews. While the NPRM raises concerns about the timing of local and state reviews, we believe the vast majority of construction projects proceed through SHPO review without substantial changes. On a rare occasion, a tower on or near a historic property might need to be reduced or a specific installation technique might need to be employed in order to avoid damage.

#56 – Lack of Response and Time Limits – NCSHPO is unaware of any widespread instances of SHPOs not responding to review requests in a timely manner. As noted, 30-day response times are the expectation outlined not only in ACHP regulation, but in the NPA. From our perspective, the most common cause of any failure to maintain the 30-day deadline is failure on the part of the applicant to provide adequate information to support their application, as previously noted. In such instances, additional information is sought in order to make a determination – which indeed can extend a review period. The NPRM further questions whether different time limits should apply to different categories of construction. From the SHPO perspective, the answer is no as this would lead to operational inconsistencies that would be extremely difficult to manage.

#59 – Batched Submission Process – While batching has been employed for Positive Train Control, enabling the review of multiple installations at once, there are some underlying characteristics that make such an approach possible. Batching can work when you have the exact same product being installed in a consistent manner in a homogenous geographic area with a repetitive impact on a historic resource. Batched submitting for reviews of several identical PTC towers along a linear stretch of railroad right-of-way can indeed, at times, make sense. But it must be noted that individual review by the SHPO will still need to take place – although that review in certain circumstances might be less difficult. But overall this means the efficiency is achieved more on the side of the applicant, not the SHPO. Considering there is such a lack of consistency with definition, equipment characteristics, and installation methods, (again, addressed earlier in this document) surrounding other types of wireless equipment, such an efficiency could be difficult to achieve, but NCSHPO remains open to discussion.

#64 - Pole Replacement – As noted in the NPRM, several exclusions for pole replacements already exist in the current NPA – provided the pole meets the definition of “tower.” The NPRM questions whether this should be broadened to allow the exclusion to apply to all poles – regardless of whether they meet the definition. This goes back to our original point about descriptions, definitions and specifications. We would need more information about what is meant by “poles” that do not meet this definition before we could determine whether such an approach makes sense. Similarly, applying this approach for poles in “rights of way” outside of historic districts would also need further explanation – namely in what meets the definition of “rights of way.” Additional efficiencies might indeed be able to be crafted under certain circumstances. Traditionally replacements “in-kind” are permitted in historic districts of various elements – but replacements of different size, material, or design pose a challenge. In these instances, a programmatic approach to replacements makes more sense – potentially allowing for wide scale replacements provided that there is a very specific agreement on the pole and method of installation.

#65/66 – Transportation Rights of Way – We have to concur with the Commission’s previous determination that the concentration of historic properties near highways and railroads makes a blanket exclusion for transportation corridors not feasible. That said, this does not mean certain circumstances could not be identified for discreet exclusions to apply. Material, height, method of installation, location, proximity to known historic properties, and cumulative impacts of adding to any existing infrastructure would all come into play.

#67 – Utility or Communications Right of Way Located on a Historic Property – While we recognize that in some instances the installation of additional equipment in an existing utility or communications right-of-way may appear to have little impact on a historic property, we are uncomfortable with the idea of an outright exclusion from review. We believe that installations on historic properties deserve some level of review by those charged with assuring their protection. In some instances there may be no issue. But in others, such as when you have a carefully installed set of existing light poles conforming to agreed-upon design criteria, equally spaced to be compatible with a historic property, random installations of additional elements would be substantially disruptive. For this reason, we recommend that review continue for installations of additional equipment on utility or communications rights-of-way on historic properties.

#69 – Collocation – As stated in the NPRM, the FCC has “...long excluded most collocations of antennas from Section 106 review,” and recently this was expanded to include “smaller infrastructure associated with new technologies.” Collocations in historic districts and within 250 of the boundary of a historic district, however, must be reviewed. The NPRM questions whether this 250 foot buffer should be reduced to 50 feet – in other words, changed from an amount less than a City block to the width of about two row houses. In our opinion, 250 feet permits a more reasonable buffer from visual effects to a historic district. It is unclear to us how much of an added efficiency this reduction would achieve.

#71 – CLG Review in Lieu of SHPO Review – There are currently 1,963 Certified Local Governments (CLGs) in the United States. Each CLG program is required to maintain their own historic commission and have their own system for survey, inventory and protection – while working closely with their SHPO. We are sensitive to the fact that industry has expressed frustration at duplicative state and local review and are willing to explore whether it would be possible, in certain limited situations, to establish a process permitting CLG review in lieu of SHPO review in historic districts.

#72 – Scope of Responsibility – The NPRM poses several questions essentially exploring whether the installation of wireless equipment should even undergo review under the NHPA at all. While it is always healthy to take a step back to determine whether something long in practice continues to make sense, we feel there is insufficient information available to even entertain this notion. The “corresponding changes in the nature and extent of wireless infrastructure deployment,” used as a reason for this approach is revealing. From our perspective, there is very little understanding of what equipment is necessary, what it looks like, how big it is, where it needs to be installed, and what means of installation will be undertaken. Without a common recognition of this, it is impossible to determine the impact of the equipment on our historic resources – so categorically excluding it from the application of the NHPA doesn’t make sense. We should also point out that whether or not the FCC issues what it would call “construction permits,” construction cannot take place without the issuance of a permit by the FCC.

As for the interpretation of what constitutes the federal nexus triggering Section 106 in the first place, or the FCC’s interpretation of their jurisdiction, we can only rely upon the existing case law which appears to have already addressed this question. We would rather work with the ACHP, the FCC and Industry to help identify efficient ways forward.

Twilight Towers (Non-Compliant Towers) – We have been engaged with the FCC and the ACHP on finding a solution to the unique issues posed by so-called Non-Compliant or “Twilight Towers” built between the adoption of the Collocation NPA and the effective date of the NPA. We understand the reason for the urgency behind finding a solution to “Twilight Towers,” as they are considered ripe for collocation of additional equipment. This collocation, of course, can’t happen without review if the existing tower never went through the Section 106 process.

Our members have expressed willingness to find a programmatic solution as they frequently receive requests for reviews of such towers. Below are some principles we have put forth in those discussions:

Identification – there needs to be a good faith effort by industry to identify the number of “non-compliant” towers in each state. This identification should be accompanied by adequate information to perform a review.

Submission Limits – Once a number is known, a reasonable limit should be established on the number of such towers that can be submitted at one time and over a period of time. Both states and tribes have indicated that they have inadequate information as to how many towers fall into this category. Therefore, it is hard to commit to a process for their review.

Programmatic Approach – Once it is known how many towers fall into this category, a programmatic approach can be developed to help streamline the review procedure.

Mitigation – An appropriate type of programmatic mitigation to resolve adverse effects should be established. A programmatic approach can offer a more efficient way of dealing with adverse effects and perhaps can be used to help support ongoing survey efforts – further aiding in future Section 106 reviews.

Removal in Extreme Cases – Review and consultation only means something if there is a willingness to a problem exists requiring attention. If any egregious tower installations are discovered that have resulted in major effects on historic resources, there should be a willingness to remove and/or move the tower. Given the number of years that have transpired,

this is a somewhat unlikely scenario, but particularly for tribes this may be important in certain extreme circumstances.

The NPRM questions on the one hand whether collocations should simply be allowed without Section 106, and on the other hand acknowledges that states and tribes have expressed concern on the cumulative impacts to towers that may already have adverse effects. This concern, to be sure, stands. We see no reason to make a potentially bad decision even worse by making yet another potentially uninformed decision. The extent of the impact is, moreover, impossible to assess – since the impact of the existing tower has not been evaluated, and the type of additional equipment is not known. We appreciate the comment in the report that “the vast majority of towers that have been reviewed under the NPA have had no adverse effects on historic properties” and contend that this positive result is due primarily to the existence of the review process itself.

CONCLUSION

The NCSHPO and SHPOs have, for years, worked with the FCC to try to achieve efficiencies in the Section 106 review process. We understand that over time, technologies change. Fortunately, it appears that smaller equipment seems to be the trend – which overall could reduce some impacts. But much more effort needs to be put into identifying and defining the equipment and revealing installation methods before additional programmatic efficiencies or exclusions can be comfortably defined or identified.

We continue to look forward to working with the FCC and with industry to find solutions that both safeguard our historic resources and enable our access of the wireless technologies that we all benefit from.

Thank you for the opportunity to provide comments.

Respectfully Submitted
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